

Position Statement

AHEAD's Perspective on the Issues of Textbook Access

The purpose of this paper is to offer assistance to colleges and universities required to scan textual instructional materials into digital formats for students with disabilities in order to provide for effective access to curriculum materials and to respond to assertions contained in a position paper disseminated in 2004 by the American Association of Publishers ¹.

BACKGROUND

The Association on Higher Education And Disability (AHEAD) is the premier professional association committed to full access and participation of persons with disabilities in postsecondary education. AHEAD's membership includes 2,200+ members, representing 1,530+ postsecondary institutions. The organization dynamically addresses current and emerging issues with respect to disability, education, and barriers to accessibility.

Lack of effective access to print-based materials has long been one of the greatest barriers for postsecondary students with print-related disabilities. Braille, audiotapes, and use of human readers have historically been the means for access. However, technological advances, especially in the last decade, have greatly improved and increased the options for effective access to print materials for these students.

The publishing community is not directly bound by the civil rights laws, Section 504 of the Rehabilitation Act of 1973 and Americans with Disabilities Act (ADA) of 1990, as they relate to education access. However, postsecondary institutions are. Colleges and universities are legally obligated to provide effective access to all course materials to students with disabilities. In the case of print or text-based materials, meeting that obligation frequently requires providing materials in an alternate format. Today, alternatives usually consist of a digital copy of the material, either for direct use by the student or to create the appropriate end-user format (e.g., Braille, large print, audio).

AHEAD understands that current technology, including the Internet, has increased the potential risk of infringement for publishers and other copyright holders by all manner of end users. However, that risk must be weighed against the increased access made possible by that same technology. We believe that the rights of students with disabilities must be considered paramount to the contractual interests of the copyright holder. Until such time as textbooks and other materials are commercially available in all formats necessary to provide access for all students, there will continue to be an inherent tension between the institution's obligation to provide access and the rights of the copyright holder. As technology continues to evolve, increasing options will be available to ensure both access and security. Meanwhile both sets of rights can be protected with reasonable processes and protections as outlined in the following.

CURRENT NATIONAL INITIATIVES: AHEAD'S E-TEXT SOLUTIONS GROUP AND THE ASSOCIATION OF AMERICAN PUBLISHERS (AAP) ALTERNATIVE FORMATS SOLUTIONS INITIATIVE

AHEAD's E-Text Solutions Group focuses on policies, procedures, best practices, and training in providing the accommodation of digital text to those students with disabilities that limit their ability to access standard print materials

The AAP's Alternative Formats Solutions Initiative is currently working collaboratively with AHEAD's E-Text Solutions Group and other stakeholder groups to develop practical, collaborative solutions to current problems in the delivery of accessible materials and to identify a "coordinated national accessible materials solutions framework."

AHEAD is committed to working with the AAP and other groups to find solutions to the issues of providing students with print disabilities access to books and other media in a manner that is timely and accurate and, as nearly as possible, allows students to obtain the information needed for their education in a manner equivalent to that of non-disabled peers.

THE CURRENT SITUATION: THE NEED TO SCAN INSTRUCTIONAL MATERIALS

As noted above, postsecondary institutions are obligated to provide access to their programs and services for all students.

[A] public college is required "to take appropriate steps to ensure that communications with students are as effective as communications with others ...

The Office for Civil Rights (OCR) has repeatedly interpreted the term "communication" in this context to mean the transfer of information, including (but not limited to) the verbal presentation of a lecturer, the printed text of a book, and the resources of the Internet. In construing the conditions under which communication is "as effective as" that provided to non-disabled persons, on several occasions OCR has regarded the three basic components of effectiveness as timeliness of delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with the disability.

With regard to the "significance of the message" of a textbook, OCR notes that a course-assigned textbook constitutes a core component of the postsecondary academic curriculum. That is, a course-assigned textbook is customarily the primary reference tool upon which the student is expected to rely. Moreover, the content structure of the course is often closely correlated to the textbook, such that it is difficult to actively learn and participate successfully in the classroom if the student is unfamiliar with the assigned textbook material. Finally, through examinations the student is ordinarily held accountable for knowing the information in the assigned portions of the textbook².

Postsecondary institutions have developed in-house conversion capabilities because, in many cases, if not most, no reasonable alternative exists. An institution that continues to provide "access" only through provision of linear audiotope, readers, or scanning stations for student use is unlikely to succeed against an OCR complaint. Not all titles are available from the recognized authorized entities, and not all publishers are currently able and/or willing to provide many of the files necessary for student use, even in states with E-text Textbook laws.

APPLICATION OF COPYRIGHT LAWS TO SCANNING AND OTHER CONVERSION OF PRINT MATERIALS

In April 2004, the AAP published a memorandum identifying the publishing community's concerns regarding application of the Chafee Amendment to Chapter 219 of the New York State Laws of 2003 as amended in 2004. The main point of the memo is that conversion by postsecondary institutions of print textbooks to a digital format for use by a student with a disability cannot be considered to fall within the copyright exception of the Chafee Amendment. The memo also describes concerns related to application of the Fair Use Doctrine to such conversions and the population being served by colleges and universities.

While AHEAD respects the opinion of AAP and shares the organization's concern for preservation of author and publisher contractual and financial rights, we note that there is currently no definitive case law on this issue. We also note that there is a long list of OCR letters clearly identifying the institutions' obligation to provide effective access to course materials, including textbooks. AHEAD offers an alternative position, arguing that when a

postsecondary institution scans a text solely for the purpose of providing access to a person with a verified print disability it is covered by the fair use and Chaffee Amendment provisions of the U.S. copyright law.³

APPLICATION OF THE DOCTRINE OF FAIR USE

While the AAP's memo focused primarily on the Chafee Amendment, AHEAD believes that this focus may confuse more than clarify the issues. Unlike the traditionally recognized authorized entities under Chafee (see below) that, in some cases, convert material to meet an anticipated market, colleges and universities convert materials to meet a currently identified need for an identified student. As such, the institution's actions may be considered to be those of an agent of the student.

AHEAD takes the position that access-necessary conversion or reproduction by a person with a print impairment, or by a college or university on such a person's behalf, must be considered a fair use. In fact, the legislative history of the 1976 Copyright Act includes a statement that making copies of a protected work in a form for use by blind persons is a fair use.⁴ The AAP in its memo notes that "such reproduction and distribution probably would qualify in most instances for a 'fair use' defense against a claim of infringement by the copyright owner . . . "

SECTION 107 OF THE COPYRIGHT ACT CODIFIES FAIR USE.

"Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work."

Whether the use of a copyrighted work constitutes fair use is determined on a case-by-case basis by applying the facts of each case to the four factors above.⁵ The four statutory factors are not to be treated in isolation; instead, their results should be weighed together in light of the purposes of copyright.⁶ Courts have held that the fourth factor, market harm, is the most important factor to be considered.⁷

Purpose and character of use. The purpose and character of the use in question is purely educational and nonprofit. These digital reproductions are undertaken solely to provide students with qualifying disabilities access to instructional course materials. In undertaking these reproductions, colleges and universities do not collect a profit; rather, they are performing their legal duty to provide appropriate accommodations for students with disabilities. The materials reproduced are educational texts used in conjunction with college coursework and are converted into digital formats for students' individual study. Without such reproductions, students would be unable to access the course materials and could not benefit from the course materials they had purchased. The use is solely educational in nature and is restricted to students with disabilities that affect their ability to utilize standard print. This factor weighs in favor of fair use.

Nature of the work. The second factor looks at the nature of the copyrighted work and calls for the recognition that some works are closer to the core of intended copyright protection than others. Here the works being reproduced are highly protected literary works. However, even if this factor does not favor fair use, the totality of the factors does, since these factors are not to be looked at in isolation.

Amount and substantiality of the portion used. The third factor looks at the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Although the entire work is being copied, that is the

only amount of the original work that is appropriate for the favored educational purpose; nothing less could be taken and still meet the educational purpose.

Effect on potential market for or value of the copyrighted work. The fourth fair use factor, the most important in this context, addresses the potential market for or value of the copyrighted work and the extent of market harm caused by the reproduction. No market harm is created by allowing colleges and universities to reproduce works as digital text. As stated earlier, AHEAD advocates that the student buy the course materials at the same cost as that of other students (sometimes, in fact, necessitating purchase of an unusable format in order to obtain a usable one). Therefore, the copyright holder and publisher still receive any revenue generated from the purchase of the material. The market for hard-copy materials is not supplanted. Colleges and universities are not buying one copy of a book and reproducing it for all of their students; there is a one-to-one ratio of books to reproduction. Instead, this is a controlled reproduction for personal educational use by a particular qualified student with a particular disability. There is no similar product marketed by the copyright holder for the student to buy and use. Again, and most importantly, there is no market harm because the student has purchased the original text and is simply creating or receiving a reproduction in digital form in order to access the paid-for content.

The publishing companies and copyright holders should not control how a bona fide purchaser uses the material so long as the work is not reproduced for use by multiple people or for commercial exploitation. Reproducing hard-copy text into digital form for the educational use of students with disabilities does not economically harm the copyright holder. "Copyright was intended to increase and not impede the harvest of knowledge."⁸ Authors will not be discouraged from creating literary works. Reproduction of instructional materials for this limited, educational use must be considered fair use.

THE CHAFEE AMENDMENT AND ITS APPLICATION TO POSTSECONDARY INSTITUTIONS

In 1996, the U.S. Copyright Law (Section 121) was amended to allow authorized entities to reproduce or distribute copies of previously published nondramatic literary works if the copies were reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities. The AAP identifies the purpose of the Chafee Amendment as

[elimination of] the need to compensate or obtain permission from a copyright owner, and thus save resources and provide greater efficiency, in the process of reproducing and distributing certain copyrighted works in formats that are accessible to persons who are blind or otherwise have difficulties making conventional use of print materials.

Prior to the amendment, long delays often prevented blind and other students with disabilities from receiving accessible formats of the print material available to their peers and required for success in their educational program. The Chafee Amendment was passed to facilitate the creation of accessible formats of print materials for the benefit of these students.

Defining an authorized entity:

The Chafee Amendment defines an "authorized entity" as a nonprofit organization or governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities (emphasis added).⁹ Read broadly, colleges' and universities' disability services departments should be included within this definition. Colleges and universities are nonprofit organizations whose primary mission is to educate students, including students with disabilities. That mission can only be accomplished when full access is accorded all enrolled students.

The AAP argues that Congress did not intend the typical educational institution, solely by virtue of its legal responsibility to accommodate students with disabilities, to qualify as an "authorized entity." To defend this proposition, the AAP focuses on the "primary mission" section of the statutory text, arguing that the Chafee

Amendment was created to “expand the capabilities” of programs like the National Library Service for the Blind (NLS) and Recording for the Blind and Dyslexic (RFB&D), and not to specifically meet the educational needs of students with disabilities.

While the amendment did expand such programs, that benefit is collateral. The Congressional Record is clear that the goal of the amendment was to end the unintended censorship of blind students’ access to current information, to prevent the delays that created a barrier to blind students being informed and literate. The ultimate beneficiary of this amendment is not third-party organizations, but persons with disabilities. The focus should remain where Congress intended ¹⁰– on access to print-based materials and not on the “primary mission” of an organization that facilitates such access.

Colleges and universities, and especially their disability services offices, should be recognized as “authorized entities” as defined under the Chafee Amendment. Failure to do so prevents institutions from meeting their legal obligation to provide access to their programs and services. A decade ago, only the most visionary could have imagined the opportunities for ready and effective access provided by today’s technology. At that time students were generally limited to depending on human readers, obtaining Braille or linear audiotape materials from NLS, RFB&D, and other traditionally recognized authorized entities, or personally scanning print materials page-by-page to create non-navigable digital text. Today’s technology, fueled by digital files, provides far more effective, efficient, independent access to text resources. It would be the ultimate irony to conclude that students can have access to the technology that can provide access but not to the electronic files for use with the technology.

Colleges and universities can and should be held to reasonable standards designed to protect the rights of all the parties involved. Print impairments are certified. Students should sign agreements not to share or reproduce converted material. No economic harm should befall the copyright holder; AHEAD believes colleges and universities must require that students purchase the materials being reproduced.

The AAP argues that institutions should receive permission from copyright holders before any scan or other conversion occurs. Unfortunately, recent surveys indicate that requests to publishers for permission to scan books are frequently denied or ignored. If permission must be obtained and the publishing companies ignore requests or refuse permission to scan books, institutions are in a Catch-22 situation—they either risk a copyright infringement suit or risk violating students’ federal right to auxiliary aids and services under the ADA and Section 504.

Again, AHEAD believes the civil rights of students with disabilities must be considered superior to publishers’ contractual rights. In the end, it is the students—the intended beneficiaries of the amendment ¹¹– who are damaged, not the publishers. It would be manifestly unjust not to allow colleges and universities to provide these accommodations in-house.

Covered disabilities:

AHEAD supports efforts to develop a Universal Design approach to education wherein a variety of formats would be available to all consumers depending on their preference and not dependent on disability status . However, the issue here (and that addressed in all state e-text laws) is not universal access, but access for students with disabilities that interfere with their ability to use standard print. If a market exists or develops for digital options, we trust publishers will recognize such and market accessible materials directly to consumers. At the point when any material is commercially available in an appropriate accessible format, therefore, this organization will recommend that no further institutional conversions be made.

The AAP appears to argue that the exemption in the copyright law only applies to blind and physically disabled students. However, that argument does not address the fact that there are students with other print disabilities who will be unable to access educational materials if the Chafee Amendment and other relevant statutes are read so narrowly. The majority of students needing alternate format print materials are identified with dyslexia and other learning disabilities. Additionally, as the biological and neurobiological bases of some learning disabilities that impair students’ access to print are better understood, a compelling argument is made for students with learning

disabilities to be considered “physically disabled.” Similarly, no rational argument can be made for excluding students with traumatic brain injuries (or other organic brain dysfunctions), whose symptoms may be similar to those of students with learning disabilities. In fact, both RFBID and Bookshare currently serve these populations.

In 2004, the AAP and many large publishing houses agreed to the inclusion of the following language in the New York State Implementation Guidelines for Chapter 219 memo12:

A print disability: The disability services coordinator or 504/ADA compliance officer should use professional judgment to determine whether a student has a disability that prevents him/her from using standard instructional materials. In general, a print disability results in the inability to effectively utilize print material and may include blindness, some specific learning disabilities, or the inability to hold a book.

Colleges and universities are legally obligated to provide appropriate accommodations, such as e-text, to all qualified students with disabilities, not just blind or physically disabled students. Applying the AAP’s limited statutory construction would leave these students without the ability to access required educational materials. Congress could not have intended this result.

Covered formats:

The AAP contends in its memo that “digital text” within the Chafee Amendment refers only to the process by which scanned text may be used by blind persons with specialized text-to-speech translation software, rather than to digital text that might be freely transmitted via the Internet or burned into CDs. Thus, it claims that “digital talking books” and other current and developing formats that not only serve accessibility needs but may also prove attractive for use by persons without disabilities were not contemplated within the scheme of the Chafee Amendment. While this may be true, the AAP’s argument is unsubstantiated by current laws. As technology evolves and becomes more sophisticated, so do our laws. The VCR was not created nor thought of during the drafting of the copyright law, yet the Supreme Court held that consumers may video record programs.

Students with disabilities should not be relegated to using outdated technology simply because the latest technology was not contemplated at the time the Chafee Amendment was drafted. Students with disabilities must have access to the latest technology available to improve their access to text materials and permit them to compete equally on the academic playing field.

CONCLUSION

AHEAD supports the position that reproduction of course texts into digital forms is a fair use of copyrighted materials under Section 107 of the United States Copyright Act. Whether or not postsecondary institutions are considered authorized entities under the Chafee Amendment, production of accessible print materials for students with print disabilities cannot be considered copyright infringement.

Access to digital text is a necessary and appropriate accommodation for students with disabilities that will become more necessary and appropriate as technology improves and more students with disabilities attend postsecondary educational institutions. Until publishers and copyright holders are willing and able to provide appropriate digital text, colleges and universities must have the legal ability to do so.

AHEAD applauds the many initiatives, including those of the publishers, taken to date to improve access to print materials for students with disabilities and will continue to serve as an active partner in finding solutions that strike an appropriate balance between accessibility for students with disabilities and copyright protections for authors and publishers.

While the immediate issue and AHEAD’s primary mission focus on access to print materials for students enrolled in postsecondary education, we urge all stakeholder groups to seek solutions that provide the opportunity for students

with disabilities to independently obtain appropriate accessible materials and that include access for all persons with print disabilities without the limitation of student enrollment.

-Association on Higher Education And Disability, December 2006

ENDNOTES:

¹ [AAP Position Paper](#). Retrieved December 6, 2006, from

² City College of San Francisco, OCR Case Docket No. 09-97-2145 (January 9, 1998)

³ Copyright laws of the United States of America. Retrieved December 6, 2006,

from <http://www.copyright.gov/title17/92chap1.html>

⁴ See Senator Chafee's introduction to the amendment in the Congressional Record. Retrieved December 6, 2006,

from <http://www.nfbcal.org/nfb-rd/1102.html>

⁵ Courts have held that the ultimate beneficiary cannot be overlooked. *Bob Jones University v. Johnson*, 396 F.Supp 597 (D.S.C. 1974), *Bartlett v. N.Y.S. Board of Law Examiners*, 156 F.3d 321 (2d Cir. 1998). See also *Bowers v. National Collegiate Athletic Association*, 118 F. Supp. 2d 494 (D.N.J. 2000), 130 F.Supp. 2d 610 (D.N.J. 2001).

⁶ See Making copyrighted works available to person with visual impairments. Retrieved December 6, 2006,

from <http://www.unc.edu/~uncclng/copy-corner55.htm>

⁷ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁸ See *id.*

⁹ Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code Circular 92.

Retrieved December 6, 2006, from <http://www.bookshare.org/web/CopyrightLaw.html>

¹⁰ See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 567 (1985).

¹¹ See *id.*

¹² See Vocational and Educational Services for Individuals with Disabilities. Retrieved December 6, 2006,

from <http://www.vesid.nysed.gov/specialed/publications/persprep/chap219.htm>

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